RECORD
AND
BRIEFS

Supreme Court, U.S
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In The
Supreme Court of the United States

WILLIAM A McGOWAN,
Petitioner,

v

DEERE & CO , INC ,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In cases subject to the *McDonnell Douglas* burden shifting analysis, if the employee alleges he has performed satisfactorily and the employer is lying about the business expectations required for the position, does the second prong of *McDonnell Douglas*, and the issue of pretext, merge because the issue is the same – whether the employer is lying?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, WILLIAM A MC GOWAN, respectfully requests a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *McGowan v Deere & Co* (7th Cir 2009), 581 F 3d 575, 107 Fair Empl Prac Cas (BNA) 225, 92 Empl Prac Dec P 43,677 The judgment of the United States District Court for the Central District of Illinois is not officially reported but can be accessed at 2007 WL 2700519 and 2007 U S Dist LEXIS 52597

STATEMENT OF JURISDICTION

The Court of Appeals rendered its judgment on September 11, 2009 The Court of Appeals denied petitioner's timely petition for rehearing and rehearing *en banc* was on October 15, 2009 On January 12, 2010, Justice Stevens extended the petitioner's time to file this petition until February 2, 2010, without any terms or conditions This Court's jurisdiction is invoked under 28 U S C § 1254(1)

STATUTORY PROVISION INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in relevant part

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to

> discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin

42 U S C A § 2000e-2(a)(1) (emphasis added)

STATEMENT OF THE CASE

William A McGowan is an African-American individual who is a citizen of Illinois He was the plaintiff in the trial court, the appellant in the Court of Appeals, and is the petitioner here Deere is a corporation that manufactures goods in Illinois, was the defendant in the district court, the appellee in the Court of Appeals, and is the respondent in this Court McGowan worked for Deere continuously from 1974 until 2004, other than time off during layoffs and injuries

In September 1999, McGowan suffered a back injury while on the job pulling wet parts apart outdoors After the back injury on the job that day, McGowan obtained first aid from Deere, and was prescribed muscle relaxants Ultimately, the pain from this work-related injury incapacitated McGowan and he was diagnosed with a herniated intervertebral disc in his lumbar spine causing constant pain

McGowan's neurologist prescribed pain medication and physical therapy, and suggested that surgery may be necessary Ultimately, another injury at work, together with constant pain, forced the issue On June 4, 2004, McGowan underwent surgery to repair the work-related injury to his back and to relieve the constant pain Guiseppe Lanzino, M D , a neurologist, performed a posterior laminectomy and discectomy on McGowan's lumbar spine between the fourth and fifth vertebrae McGowan was to return to work at Deere around August 4, 2004 with temporary restrictions that would allow him to lift relatively large weights

After the procedure, Dr Lanzino restricted McGowan from lifting more than 50 pounds for the first month after his return to work On July 31, 2004, Dr Lanzino's office wrote that McGowan would be able to return to full activity and work, without restrictions, in September 2004 On October 20, 2004, Dr Lanzino's office wrote a note allowing McGowan to lift up to 80 pounds

In August of 2004, however, Deere's doctor, William O Candler, D O , insisted that McGowan was permanently restricted from lifting more than 25 pounds He ordered an evaluation that resulted in an assessment consistent with his prior opinion

Dr Candler would not allow McGowan to return to his job as a machine operator Also, McGowan was denied two other jobs he sought at Deere in sheet fabrication Deere claimed that McGowan was denied all three jobs because of Dr Candler's 25 pound lifting restriction

McGowan, filed a complaint against Deere in an Illinois state court for unlawful discrimination based on race Deere removed McGowan's case to the United States District Court for the Central District of Illinois The jurisdiction of the district court was invoked under 28 U S C § 1331 because the complaint raised a federal question

Deere filed an answer, admitting that McGowan was employed and injured at its plant Deere also admitted that McGowan was cleared by his doctor to return to work with certain temporary weight lifting restrictions Deere also admitted that McGowan was not allowed to return to his original job as a machine

operator Deere asserted that McGowan had no right to return to his old job by virtue of an alleged weight lifting restriction allegedly determined by Deere

Deere filed a motion for summary judgment claiming that McGowan could not prove that Dr Candler's 25 pound weight restriction was a pretext for race discrimination

McGowan responded by providing proof from his own doctor that he was qualified for the jobs he sought because he was not under any weight lifting restrictions by his own doctor McGowan also identified other similarly situated employees of Deere not of African-American descent who were allowed to return to the same or similar jobs even though they had more stringent weight restrictions

McGowan's proof that he was qualified for the three jobs was the documentary evidence from his doctor that he was not subject to a 25 pound restriction McGowen's proof that other similarly situated employees of Deere were treated more favorably was his own testimony that other Deere employees were allowed to work the jobs he sought with more restrictive weight restrictions that Dr Candler's 25 pound limit McGowan testified by affidavit that Gary Edwards was a white man Deere employee in the same department with the same job as McGowan's as a machine operator who also reported to McGowan's supervisor, Bill Coward, also white McGowan testified in his affidavit that Edwards was allowed to work as a machine operator for Mr Coward in McGowan's department even though he could not lift In addition, according to McGowan, Kirby McLaughlin was a Caucasian Deere employee who worked in the

department that McGowan sought employment in steel fabrication who was allowed to work with a 10 pound weight restriction McGowan corroborated his testimony regarding McLaughlin with a document showing that McLaughlin was working in that department on April 15, 2007

The trial court granted Deere's motion for summary judgment McGowan appealed to the Court of Appeals, which affirmed, deciding that McGowan's evidence of similarly situated employees lacked sufficient detail The Court of Appeals held alternatively that McGowan failed to adequately prove intentional discrimination McGowan sought reconsideration and reconsideration *en banc* in the Court of appeals, arguing that the panel's opinion conflicts with the Court of Appeals' own decision in *Peirick v Indiana University-Purdue University Indianapolis* 510 F 3d 681 (2007) and the opinion of this Court in *Reeves v Sanderson Plumbing Products, Inc* , 530 U S 133 (2000) The Court of Appeals declined to reconsider the opinion in any manner and without any comment

REASONS FOR ALLOWANCE OF THE WRIT

I THIS COURT SHOULD SETTLE THE SEVENTH CIRCUIT'S MERGER DOCTRINE AS THE UNIFORM LAW OF THE LAND AS A FURTHER ELABORATION AND PERFECTION OF THE HOLDINGS OF *ST MARY'S HONOR CENTER V HICKS*, 509 U S 502 (1992) AND MORE RECENTLY *REEVES V SANDERSON PLUMBING PRODUCTS, INC* , 530 U S 133 (2000) THAT THERE IS A RELATIONSHIP BETWEEN THE SECOND PRONG OF *MC DONNELL DOUGLAS* AND THE ISSUE OF PRETEXT

This court should review this case to settle whether the Seventh Circuit's merger doctrine first announced in *Coco v Elmwood Care, Inc* , 128 F 3d 1177, 1179 (1997) should be the law of the land as a further elaboration and improvement of the framework of proof established by this Court in *McDonnell Douglas Corp v Green*, 411 U S 792, 802-04 (1973) under this Courts' rule 10(c) This would be the logical extension of the holdings of *St Mary's Honor Center v Hicks*, 509 U S 502 (1992) and more recently *Reeves v Sanderson Plumbing Products, Inc* , 530 U S 133 (2000) that there is a relationship between the second prong of *McDonnell Douglas* and the issue of pretext, an important issue of federal law

Unlawful employment discrimination takes place almost exclusively in the mind of the employer Only the action itself, rather than the cause, takes place outside of the mind of the employer Thus, there is rarely any direct evidence of unlawful employment discrimination because we cannot see into the minds of the employer

Yet Congress made it unlawful and actionable for an employer to take adverse employment action "because of" race (42 U S C A § 2000e-5(f)(1)) Thus it fell to this Court to develop rules and standards for determining the sufficiency of the proof in cases brought under the Congressional act

Of course, this Court did just that in *McDonnell Douglas Corp v Green*, 411 U S 792, 802 (1973), specifying the four elements of the plaintiff's *prima facie* case, which as adapted to this case are

> (1) he is a member of a protected class, (2) he was qualified for the applicable positions, (3) he suffered an adverse employment action, and (4) similarly- situated persons not in the protected class were treated more favorably

See Reeves v Sanderson Plumbing Products, Inc , 530 U S 133, 142 (2000), *Fane v Locke Reynolds, LLP*, 480 F 3d 534, 538 (7th Cir 2007)

If the plaintiff proves these elements, the burden shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for the action Upon the production of such evidence, the *McDonnell Douglas* framework disappears, leaving the sole issue "discrimination *vel non* " *Postal Service Board of Governors v Aikens*, 460 U S 711, 714 (1983) If the defendant produces some evidence of a legitimate, nondiscriminatory reason, the plaintiff then has the burden to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination *Texas Department of Community Affairs v Burdine*, 450 U S 248, 256 (1981)

The Seventh Circuit holds that when "an employee claims that she 'performed satisfactorily and the employer is lying about the business expectations required for the position, the second prong and the pretext question seemingly merge because the issue is the same – whether the employer is lying'" *Peirick v Indiana University-Purdue University Indianapolis*, 510 F 3d 681, 687 (2007), *Hague v Thompson Distrib Co* , 436 F 3d 816, 823 (2006), *Coco v Elmwood Care, Inc* , 128 F 3d 1177, 1179 (1997) McGowan's counsel has looked without success for decisions from other Courts of Appeals applying, commenting on, or rejecting, the Seventh Circuit's merger doctrine Since the other Courts of Appeal have not addressed the issue of the merger doctrine in the thirteen years since the Seventh Circuit started applying it, there is no value in waiting for this issue to further percolate in the lower courts The issue is as ripe now for review as it ever will be

This Court should adopt the merger doctrine Indeed, the Seventh Circuit's merger doctrine is consistent with this Court's analysis of the interaction between the second prong of the *McDonnell Douglas* analysis and the issue of pretext that only arises if the plaintiff makes a prima facie case and the employer produces some evidence of a legitimate, non-discriminatory reason This consistency further warrants this Court's review to consider whether to settle the merger doctrine as a correct interpretation of Congress' statutory framework and this Court's nuanced development of the burdens of proof and production intended to "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination" *Burdine*, 450 U S at 255, n 8 (1981)

In *St Mary's Honor Center v Hicks*, 509 U S 502 (1992), this Court held that the "factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination" *Id* , at 511 Thus, the connection in *St Mary*'s between the second prong of the *McDonnell Douglas* analysis and the issue of pretext is consistent with the Seventh Circuit's merger doctrine

In fact, *St Mary's* may be the genesis of the Seventh Circuit's merger doctrine *St Mary's* was decided in 1993 The Seventh Circuit's merger doctrine first appeared in 1997, with the comment "Actually to prove a violation, the plaintiff would have to persuade the trier of fact that the pretext was a pretext for discrimination, but the trier of fact could, though it would not be compelled to, infer discrimination from the evidence constituting the prima facie case *Coco*, 128 F 3d at 1179 (1997) (internal citation omitted)

Later, in 2006, the Seventh Circuit stated its merger doctrine in more elaborate detail

> However, if the plaintiffs argue that they have performed satisfactorily and the employer is lying about the business expectations required for the position, the second prong and the pretext question seemingly merge because the issue is the same-whether the employer is lying

Hague v Thompson Distribution Co , 436 F 3d 816, 823 (2006) Interestingly, in *Hague*, like in the facts of this case

> the employer maintains that the plaintiffs were not qualified for the position (the second prong of the prima facie case) and that it fired the plaintiffs for a legitimate non-discriminatory reason The plaintiffs respond by arguing that the employer is lying about both its business expectations and about the proffered reasons for their termination

Id , at 822 This interesting factual similarity defeats the Seventh Circuit's attempt to distinguish this case from its merger doctrine

But *Hague* is in line with *St Mary's*, and more explicitly so, which leads up to the Seventh Circuit's latest case stating its merger doctrine in the same language of *Hague Peirick v Indiana University-Purdue University Indianapolis*, 510 F 3d 681, 687 (2007) But *Peirick* did not involve the firing of an employee for being unqualified Rather, in *Pierick* the employer fired the plaintiff alleging poor performance, her alleged "her failure to meet [the employer's] standards " *Id* , at 691

So the Seventh Circuit's merger doctrine may have its genesis in *St Mary's* But the Seventh Circuit here inexplicably refused to apply its own doctrine to this case and further refused to consider the matter en banc This internal issue in the Seventh Circuit is a further reason to review this case Eugene Gressman *et al* , Supreme Court Practice 254 (9th ed 2007) This is an important issue, especially in an economic recession The lower courts need to know any relationship between proof of the second *McDonnell Douglas* prong and the issue of pretext Thus, this is an appropriate case for this Court to take to consider

the merger doctrine from the Seventh Circuit in light of this Court's holding in *St Mary's*

But even beyond *St Mary's*, the merger doctrine is even more deeply consistent with this Court's more recent holding that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated" *Reeves v Sanderson Plumbing Products, Inc*, 530 U S 133, 148 That is exactly the case here McGowan produced evidence for his prima facie case He came forward with evidence that he could lift more than 25 pounds Deere responded with evidence that McGowan should be limited to lifting only 25 pounds, thus disqualifying McGowan McGowan's proof that he can lift more than 25 pounds from his own doctor's records and notes served to both prove his prima facie case and show pretext McGowan's evidence from his own doctor's records and notes that he could lift more than 25 pounds is evidence of his qualification for the job and is also evidence that Deere's explanation for its action is just a pretext or a lie Since this evidence from McGowan's own doctor met two different burdens placed on McGowan under *McDonnell Douglas* and its progeny, it is fair to say that in this type of case those two issues "merge," just like *St Mary's* and *Reeves* teach without using that specific word

Thus, the opportunity to settle the issue of the merger doctrine is an appropriate reason to issue a writ of certiorari to the Seventh Circuit under this Court's rule 10(a)

II THE DECISION BELOW CONFLICTS WITH *ST MARY'S* AND *REEVES*, FURTHER WARRANTING REVIEW IN THIS COURT

St Mary's held that the "factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination" 509 U S at 511 In addition, *St Mary's* instructs *not* to assess the credibility of the employers proffered explanation *Id*, at 509 Determining whether the employer has met its burden of producing a legitimate, nondiscriminatory reason for its contested action "can involve no credibility assessment" *Id*

McGowan supplied evidence from his own doctor that he should not be subject to a 25 pound weightlifting restriction This evidence conflicted with Deere's evidence that McGowan should have such a restriction This conflicting evidence could have been resolved by the trier of fact by determining that Deere's doctor was lying to cover up his intentional discrimination But neither the trial court nor the Court of Appeals would let McGowan present his evidence to the trier of fact McGowan elected trial by jury These decisions by the courts below conflict with *St Mary's*, warranting this Court's review under rule 10(c)

The Court of Appeals reasoned that "the focus of our inquiry is not whether the restriction is accurate, it is the honesty of Deere's belief in the stated reason that matters" A–10 Thus, the Court of Appeals considered Deere's credibility This consideration of credibility conflicts with *St Mary's* strict injunction *not* to

consider the credibility of the employer's explanation, thus further warranting this Court's review

The judgment of the Court of Appeals also conflicts with *Reeves* *Reeves* held that after the employer produces an explanation for its actions, "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case on the issue of whether the defendant's explanation is pretextual " 530 U S at 143 (internal quotation marks and a citation omitted)

But here the Court of Appeals refused to consider the evidence that McGowan could lift more than 25 pounds on the issue of whether Deere's explanation was a pretext

Based on the conflict with *St Mary's* and *Reeves*, McGowan requests a review of this case in this Court

III THE COURT OF APPEALS' FINDING – THAT THE EVIDENCE OF SIMILARLY SITUATED EMPLOYEES IS INSUFFICIENT TO AVOID SUMMARY JUDGMENT – CONFLICTS WITH THIS COURTS HOLDING IN *LUJAN V NATIONAL WILDLIFE FEDERATION*, 497 U S 871, 888-89 (1990) THAT "ONE SWORN AVERMENT" OF EACH DISPUTED FACT IS SUFFICIENT TO AVOID SUMMARY JUDGMENT AND CONFLICTS WITH THE REQUIREMENT TO DRAW ALL INFERENCES IN FAVOR OF THE OPPONENT OF SUMMARY JUDGMENT

Finally, the Court of Appeals affirmed based on its decision that McGowan failed to come forward with sufficient details on the circumstances of his proposed comparators to avoid summary judgment This conflicts with this Court's decision in *Lujan v National Wildlife Federation*, 497 U S 871, 888-89 (1990) that "one sworn averment" of each disputed fact is sufficient to avoid summary judgment, warranting review based on rule 10(c) This is an important issue, as virtually all employment discrimination cases are subjected to the scrutiny of the summary judgment process and the district courts have demonstrated an increasing willingness to grant summary judgment to the employer Given that the lower courts are likely to see a greater number of these employment cases in light of the recent economic conditions, the lower courts need appropriate guidance

Summary judgment is only proper where "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law " Fed R Civ P 56(c) To avoid summary judgment, the

opposing party must supply "at least one sworn averment" of each disputed fact *Lujan v National Wildlife Federation*, 497 U S 871, 888-89 (1990) The "inferences to be drawn from the underlying facts contained in (the moving party's) materials must be viewed in the light most favorable to the party opposing the motion " *Adickes v S H Kress & Co* , 398 U S 144, 158-59 (1970)

In this case, one of the disputed facts was the fourth prong of the *McDonnell Douglas* framework – whether Deere treated similarly situated persons not in the protected class more favorably than McGowan McGowan identified two such employees, specifying their specific weight lifting limitations and that they were not of African-American descent The Court of Appeals denounced McGowan's evidence of the similarly situated employees because he testified that one of them could not lift The Court of Appeals dispatched the other employee complaining that McGowan produced "insufficient details on the full range of restrictions [the employee] might have had

In disregarding this evidence of comparable employees that Deere treated more favorably, the Court of Appeals violated this Court's holdings in *Lujan* and *Adickes*

McGowan supplied "at least one sworn averment" with respect to each of his two examples *Lujan*, 497 U S at 888-89 And in affirming the summary judgment for Deere, the Court of Appeals failed to make the required inferences in McGowan's favor as required by *Adickes*, 398 U S at 158-59 For example, under *Adickes* the Court of Appeals should have inferred from McGowan's testimony that the employee

who could not lift was completely restricted from any and all jobs requiring any lifting at all of items of any weight whatsoever In contravention of *Adickes*, the Court of Appeals impermissibly turned a blind eye to that inference, satisfied to condemn McGowan for his failure to supply sufficient details on "full extent" of his restrictions A–9

Similarly, the Court of Appeals dispatched McGowan's claim by complaining that for the other employee McGowan "provided insufficient details of the full range of restrictions [that employee] might have had," even though McGowan testified that this other employee was allowed to work with a 10 pound restriction *Id* Just like the first employee, the Court of Appeals impermissibly inferred that there were other unstated restrictions on that employee *Adickes* compelled the lower court to infer that there were no restrictions on this employee other than the 10-pound lifting restriction

The failure of the Court of Appeals to properly apply the principals of summary judgment is an example of a critical issue that will arise in virtually every case of any importance that threatens to unfairly deprive employees of their constitutional right to a trial by jury, warranting this Court's review

CONCLUSION

For the foregoing reasons, McGowan respectfully requests a writ of certiorari to review the judgment of the Court of Appeals

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,
Seventh Circuit

No 07-2967

WILLIAM A MCGOWAN,

Plaintiff – Appellant,

v

DEERE & COMPANY,

Defendant – Appellee

Appeal from the United States District Court
for the Central District of Illinois
No 06 C 4004 – **Joe Billy McDade**, *Judge*

Argued May 7, 2009 – Decided Sept 11, 2009

Before FLAUM and WILLIAMS, Circuit Judges, and LAWRENCE, District Judge *

LAWRENCE, District Judge

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* The Honorable William T Lawrence, United States District Judge for the Southern District of Indiana, sitting by designation

William A McGowan filed this action against his employer, Deere & Company ("Deere"), alleging *inter alia* that Deere discriminated against him on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U S C § 2000e *et seq* , and 42 U S C § 1981 by refusing to reinstate him to his position at Deere and refusing to promote him to other positions that he believes he was entitled to receive by virtue of his seniority The district court granted summary judgment in favor of Deere on these claims, and McGowan now appeals For the reasons set forth in this opinion, we affirm the district court's decision [1]

I Background

McGowan is an African-American male With the exception of a period of time when he was laid off, he has worked continuously at Deere from 1974 to the present In September 1999, McGowan injured his back and sought treatment from a number of doctors, including Deere's company doctor, Dr William Candler McGowan was ultimately diagnosed with a herniated intervertebral disc in his lumbar spine that caused constant pain He was prescribed pain medication and physical therapy, and it was suggested that he might have to undergo surgery In March 2000, McGowan returned to work under either a 25-pound or a 35-pound weight restriction, and his employment

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[1] McGowan had also argued below that Deere discriminated against him by failing to give him an income security benefit and that Deere violated the Americans with Disabilities Act, 42 U S C § 12101 et seq Because McGowan does not press either of these arguments on appeal, we limit our discussion to McGowan's refusal to reinstate and refusal to promote arguments

records indicate that by July 3, 2001, he was on a permanent 25-pound restriction

At some point McGowan suffered another injury that, when coupled with his pre-existing pain, led to the decision to undergo back surgery The surgery was performed in June 2004 by a neurosurgeon, Dr Giuseppe Lanzino After the surgery, Dr Lanzino and his nurse practitioner sent a letter to McGowan's treating physician, Dr Brian Cady, dated July 31, 2004 In that letter, they indicated that McGowan could return to work with a 50-pound restriction and that after a month he should be able to resume full duty The nurse practitioner filled out a form with essentially this same information However, a few days later Dr Candler informed McGowan that he was still under a 25-pound weight restriction Dr Candler claims that he contacted Dr Lanzino after receiving notice of the 50-pound restriction and that both of them agreed that a 25-pound restriction was more appropriate There is a note to this effect in Dr Candler's records, but nothing appears to have been submitted by the parties from Dr Lanzino's office regarding this conversation

Thereafter, on October 20, 2004, the nurse practitioner signed another form stating that McGowan could lift up to 80 pounds Dr Candler claims that after he received this form, he contacted Dr Lanzino in early November and that Dr Lanzino rescinded this form and reiterated his agreement with the 25-pound restriction There does not appear to be any documentation in either Dr Candler's or Dr Lanzino's medical records to support Dr Candler's claim

McGowan was eventually sent to Greg Monson, a physical therapist, in June 2005 for a Functional Capacity Evaluation ("FCE") Monson concluded generally that McGowan could perform "medium-heavy" work and listed very specific weight limitations for different activities For example, Monson concluded that McGowan could lift 85 pound from floor to waist infrequently 1 to 4 times per day and could lift 25 pounds frequently (33 to 250 repetitions per day) from waist to eye level as a one-hand carry In addition, Monson wrote a note in August 2006 indicating that an across-the-board restriction of 25 pounds on a frequent basis was appropriate McGowan's treating physician, Dr Cady, noted in June 2006 that he saw nothing to contradict the FCE based on his review of McGowan's history of prior back injury and his own examination

Ultimately, Dr Candler kept McGowan on a 25-pound restriction As a result, McGowan remained unable to return to his prior position Moreover, he was unable to secure two other positions as a sheet fabricator cutting parts with a "CNC laser" for which he was the senior bidder because those two positions required an employee to be able to lift, pull, and push more than 25 pounds Instead, the Industrial Relations Administrator at Deere awarded the positions to other individuals McGowan blames Dr Candler for his failure to receive these positions and believes that Dr Candler is biased against him He contends that Dr Candler's animus is evidenced by the fact that Dr Candler was upset that McGowan received a settlement for his original back injury when Dr Candler did not think that McGowan was entitled to the settlement

Following the decision to award the CNC laser cutting jobs to other individuals, McGowan initiated this suit alleging race discrimination for failing to return him to his old position and failing to award him the two CNC laser cutting positions In support of his claims, he alleged that two similarly-situated individuals, Gary Edwards and Kirby McLaughlin, were permitted to return to positions even though they had restrictions [2] Edwards allegedly had the same job and supervisor as McGowan and returned to work "after an injury despite not being able to lift" Aside from this information, McGowan provided no further specifics on what limitations (e g , pushing and pulling) were placed on Edwards or whether Dr Candler had examined Edwards and imposed any restrictions McGowan claims that McLaughlin was allowed to work in one of the departments where a CNC laser cutting job was located even though she had a 10-pound weight restriction McLaughlin performed the job of breaking out cut parts Similar to Edwards, it is unclear what other restrictions McLaughlin had or whether Dr Candler was involved in any way with her treatment or restrictions

Deere moved for summary judgment on McGowan's claims The district court concluded that McGowan had failed to show that similarly-situated individuals were treated more favorably and that McGowan was not qualified for the positions because of the weight restrictions In addition, the district court found that, even if McGowan were qualified for the positions,

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[2] Interestingly, McGowan testified at his deposition that Edwards was not permitted to return to his old job after the injury

McGowan had failed to demonstrate that Deere's stated reason for not placing him in the positions was pretext Accordingly, the district court granted Deere's motion for summary judgment

II Discussion

We review a district court's summary judgment decision *de novo Chaklos v Stevens*, 560 F 3d 705, 710 (7th Cir 2009) Summary judgment is proper where "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law " Fed R Civ P 56(c)

As noted, McGowan brings his claims of discrimination pursuant to Title VII and § 1981 As this Court has observed, "[a]lthough section 1981 and Title VII differ in the types of discrimination they proscribe, the methods of proof and elements of the case are essentially identical " *Johnson v City of Fort Wayne, Ind* , 91 F 3d 922, 940 (7th Cir 1996) Because McGowan has no direct evidence of race-based discrimination, he has elected to proceed under the indirect, burden-shifting approach of *McDonnell Douglas Corp v Green*, 411 U S 792 (1973), for his claims Therefore, he has to show that (1) he is a member of a protected class, (2) he was qualified for the applicable positions, (3) he suffered an adverse employment action, and (4) similarly-situated persons not in the protected class were treated more favorably *Fane v Locke Reynolds, LLP*, 480 F 3d 534, 538 (7th Cir 2007) If McGowan can make out a *prima facie* case on these four factors, the burden of production shifts to Deere to offer a permissible, nondiscriminatory reason for the adverse employment action *Id* If it can do so, the burden then shifts back

to McGowan to show that the stated reason is merely a pretext for discrimination, *i e* , a lie *Id* The pretext analysis focuses on whether the reason was honest and not whether it was accurate or wise *Barricks v Eli Lilly & Co* , 481 F 3d 556, 560 (7th Cir 2007) Notwithstanding the shifting burdens, McGowan bears the ultimate burden of persuading the trier of fact that Deere intentionally discriminated against him on the basis of his race *Fane*, 480 F 3d at 538

Here, the parties dispute the second and fourth prongs as well as the pretext analysis When an employee claims that he is qualified and that the employer is lying about the reasons for an adverse employment action, the second prong and the pretext question merge *Peirick v IUPUI Athletics Dep't*, 510 F 3d 681, 687 (7th Cir 2007) Therefore, we begin with the fourth prong of the *prima facie* case

A Analysis of McGowan's Proffered Comparators

McGowan has pointed to two comparators, Edwards and McLaughlin, whom he believes received more favorable treatment because they were allowed to return to work despite having weight restrictions allegedly greater than his own restrictions [3] To assess whether two employees are similar for purposes of the "similarly-situated" test, "a court must look at all relevant factors, the number of which depends on the context of the case " *Radue v Kimberly-Clark Corp* ,

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[3] In the district court, McGowan also listed the names of several other employees who he alleged were allowed to return to work following injuries, but he provided even less detail about those individuals than he did about Edwards and McLaughlin

219 F 3d 612, 617 (7th Cir 2000) Thus, this test involves a flexible, common-sense approach with requirements that vary from case to case *Barricks*, 481 F 3d at 560 Regardless of the context, however, the purpose of the test remains the same to discern whether there are sufficient common factors between the plaintiff and another employee to allow for a meaningful comparison in order to divine whether discrimination was involved in an employment decision *Id*

The district court was critical of McGowan's evidence on this prong because the only evidence McGowan presented was his own affidavit McGowan argues that this evidence is competent because it is based on his personal knowledge In his favor, it is true that this Court has indicated that self-serving affidavits can be used in opposition to motions for summary judgment provided that they meet the usual requirements, such as being based on personal knowledge and setting forth specific facts showing that there is a genuine issue for trial *See, e g , Buie v Quad/Graphics, Inc* , 366 F 3d 496, 504 (7th Cir 2004) But we need not decide if the affidavit meets this criteria because, even accepting it for summary judgment purposes, it is insufficient

The critical areas of focus between McGowan and his comparators include the work restrictions each individual had and the duties each individual was required to perform McGowan had an across-the-board restriction that prohibited him from lifting, pulling, or pushing more than 25 pounds In comparison, McGowan states simply that Edwards was not able to lift Relying solely on McGowan's statement, it is unclear what the full extent of

Edwards's restrictions were For instance, did Edwards have any restrictions related to pulling or pushing? McGowan has provided no evidence to shed light on these circumstances

McGowan's reliance on McLaughlin is fraught with similar difficulties He contends that McLaughlin had a 10-pound lifting restriction, which is disputed by Deere's evidence that McLaughlin actually had a 30-pound restriction This evidentiary dispute aside, and accepting for summary judgment purposes as we must that there was a 10-pound restriction, McGowan has provided insufficient details on the full range of restrictions that McLaughlin might have had In addition, it is not even clear that McLaughlin was required to perform the same job Specifically, it appears that McLaughlin removed cut parts It is unclear how this position related to the CNC laser cutting position, e g , whether it was more or less strenuous or how the weight bearing requirements might have been similar or different In any event, if McLaughlin was performing a different job as the evidence suggests, he is not a similarly-situated individual in the first instance

Moreover, McGowan's real argument is that Dr Candler harbored some racial animus and recommended an inaccurate weight restriction that kept him from obtaining the positions that he wanted However, he provides virtually no information on Edwards and McLaughlin regarding Dr Candler's assessment of them (if any was performed) and how it might relate to or possibly conflict with the medical records from other medical providers

In short, McGowan has provided insufficient details about his proffered comparators to allow a meaningful comparison Because he is unable to demonstrate that a similarly-situated person not in the protected class was treated more favorably than he was, he cannot make out a prima facie case of racial discrimination

B Deere's Basis for Its Decisions

Even though our conclusion on the similarly-situated prong is sufficient by itself to uphold the district court's grant of summary judgment, we nonetheless address Deere's stated reason for its decisions, *i e* , the parties' pretext arguments It is undisputed that Deere considered McGowan unqualified for the positions he desired because of the 25-pound weight restriction imposed by Dr Candler McGowan goes to great lengths to try to demonstrate that the restriction was inaccurate He also relies on *Peirick* to argue that he need do nothing more than this in order to defeat summary judgment In other words, he believes that his argument relieves him from having to present evidence of circumstances that suggest pretext

As an initial matter, McGowan's argument misses the mark The focus of our inquiry is not on whether the restriction was accurate, it is the honesty of Deere's belief in the stated reason that matters *Barricks*, 481 F 3d at 560 Otherwise, this Court would be substituting its judgment for the employer contrary to the oft-noted fact that this Court is "not a super-personnel board charged with evaluating the general quality of employment decisions" *Brewer v Bd of Trustees of Univ of Ill* , 479 F 3d 908, 922 (7th Cir 2007) Indeed, within the context of this case,

McGowan's argument would lead the Court down a path of reconciling conflicting medical evidence [4]

Further, McGowan is mistaken if he believes that he need do no more than demonstrate that the 25-pound restriction is inaccurate Nothing in *Petrick* indicated that a plaintiff is relieved of the obligation of coming forward with evidence of pretext if he claims that the stated reason for an employment action is simply wrong In other words, just because the analysis of the second prong of the prima facie case merges with the pretext analysis does not mean that a plaintiff does not have to present some circumstances from which intentional discrimination can be inferred Otherwise, an honest but mistaken belief would subject an employer to liability Thus, in order to show pretext, a plaintiff is still required to show that the employer's stated reason for an employment action is dishonest and that the true reason was based on discriminatory intent *Perez v Illinois*, 488 F 3d 773, 777 (7th Cir 2007) If a plaintiff lacks direct evidence of this, he may use indirect evidence and must show that the stated reason is not credible and is factually baseless, and he ultimately must be able to point to some circumstances from which an inference can be drawn that the real reason for the employment action was discriminatory *Id* at 777-78 Indeed, this Court went to great lengths in *Petrick* to note the various

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[4] We recognize that Deere disputes whether the medical evidence is conflicting In particular, Deere relies on Dr Candler's affidavit which indicates that he called Dr Lanzino and Dr Lanzino recanted his opinion regarding a 50-pound restriction We need not resolve the soundness of this evidence on summary judgment and will assume that there is some evidence that a 50-pound restriction might have been appropriate

circumstances that demonstrated that the employer's stated reason was suspect *See Peirick*, 510 F 3d at 691-94

Of course, we recognize the cautionary language in *Reeves v Sanderson Plumbing Products, Inc* , 530 U S 133, 146-48 (2000), that circumstantial evidence probative of intentional discrimination can include proof that an employer's explanation for an employment action is unworthy of belief, and that this circumstance coupled with the *prima facie* case can permit a trier of fact to find unlawful discrimination But *Reeves* did not eviscerate the requirement that there must still be circumstances demonstrating the presence of intentional discrimination, the very harm that Title VII and similar statutes are meant to redress Thus, contrary to McGowan's belief, a plaintiff must do more than simply allege that an employer's stated reasons are inaccurate, he must still have some circumstances to support an inference that there was an improper motivation proscribed by law

Unlike the circumstances of *Reeves* and *Peirick*, there is no evidence suggesting that Deere's stated reason for its decisions is suspect and that its real motivation was discriminatory For one thing, there is medical evidence to support the 25-pound restriction McGowan had been under a 25-pound restriction following his initial injury in 1999, a fact with which Dr Candler was well-acquainted Aside from Dr Candler's opinion, Deere had an opinion from Monson, a physical therapist, who completed an FCE with very specific weight limitations for different activities and concluded that an across-the-board restriction of 25 pounds on a frequent basis was appropriate Moreover, Dr Cady, McGowan's treating physician, could not

find any reason to dispute the FCE Thus, there was a medical basis for the restriction, and consequently Deere's stated reason was not factually baseless

Ultimately, McGowan has not produced any evidence suggesting that Deere's actions were motivated by racial animus There simply is no evidence that Dr Candler was biased against McGowan because of his race In fact, McGowan claims that Dr Candler is biased against him because he was upset that McGowan received a settlement for the back injury in 1999 If this is true, it certainly would reflect negatively on Dr Candler's professionalism, but it would not be unlawful under Title VII or § 1981 However, even if we give McGowan the benefit of the doubt that Dr Candler might be racially-biased, there is nothing to show that Deere knew or should have known that Dr Candler harbored such a bias and that it should not believe his medical opinion (particularly when there was other medical evidence to support it) when it decided not to give McGowan the positions he desired In short, McGowan has not demonstrated that Deere intentionally discriminated against him because of his race, even if he could make out a prima facie case of race discrimination

III Conclusion

For the foregoing reasons, we AFFIRM the district court's grant of Deere's motion for summary judgment

APPENDIX B

United States District Court
Central District of Illinois

		Filed 20 July 2007
WILLIAM McGOWAN,	)	Clerk, U S District
	)	Court, ILCD
Plaintiff,	)	
	)	
v	)	No 06-cv-4003
	)	
DEERE & COMPANY,	)	
	)	
Defendant	)	

ORDER

JOE BILLY McDADE, United States District Judge

Before the Court are the Motion for Summary Judgment filed by Defendant, Deere & Company, on May 1, 2007 [Doc 13], the Motion to Strike Affidavit of William Candler filed by Plaintiff, William McGowan, on June 19, 2007 [Doc 17], and the Motion to Strike Affidavit of Richard D'Hooge filed by Plaintiff on June 19, 2007 [Doc 19] For the reasons that follow, the Motion for Summary Judgment is GRANTED, the Motion to Strike Candler's Affidavit is DENIED, and the Motion to Strike D'Hooge's Affidavit is MOOT

BACKGROUND

Plaintiff has worked for Defendant in various capacities from 1974 to the present (he was laid off

from 1982 to 1989 or 1990) Since 2003, he has been employed as a "retrieve and storage" stocker and truck driver

The allegations in the Complaint arise, in part, from Plaintiff's back condition and the manner in which Plaintiff was treated by Defendant as a result In September 1999, Plaintiff injured his back and sought treatment At that time, Plaintiff was examined by a number of doctors including Dr William Candler, who also is employed by Defendant as its company physician In March of 2000, Plaintiff worked under a 25 pound or 35 pound weight restriction

Plaintiff underwent surgery on his back by Dr Giuseppe Lanzino, a neurosurgeon, on June 2, 2004 In a form signed by Anne Wagenbach, a Certified Nurse Practitioner for Dr Lanzino's practice, Plaintiff was released for work on August 2, 2004 with a 50 pound weight restriction that would last for one month Additionally, a letter from Dr Lanzino to Dr Brian Cady (Plaintiff's treating physician) dated July 31, 2004, outlined the 50 pound restriction with the addition that after a month, "he should be able to go up to full duty at that time " Plaintiff returned to work on August 2, 2004

A few days later, however, Dr Candler stated to Plaintiff that he was still under a 25 pound weight restriction On October 20, 2004, Nurse Wagenbach signed another form which stated "may lift up to 80 pounds " Dr Candler received this note in November 2004 and called Dr Lanzino's office regarding Plaintiff's restrictions Dr Candler stated that Dr Lanzino "retracted the note and reiterated that he did

not disagree with the 25 pound restriction " (William Chandler Aff ¶ 6)

On June 8, 2005, Plaintiff underwent a Functional Capacity Evaluation ("FCE") which was performed by Greg Monson, a Physical Therapist Monson generally concluded that Plaintiff was capable of performing "medium-heavy" work The report contains very specific weight limitations, the frequency that various weights can be lifted, and the manner in which those weights can be lifted For example, the report indicates that Plaintiff can lift 85 pounds from floor to waist infrequently, or only 1 to 4 repetitions per day The report also indicates that he can lift 25 pounds frequently, meaning 33 to 250 repetitions per day, from waist to eye level and as a "one hand carry " The maximum weight the Plaintiff could lift was 85 pounds, floor to waist, 50 pounds, waist to eye level, 50 pounds as a "one hand carry," 70 pounds as a "two hand carry," and 85 and 75 pounds as push or pull weight, respectively

A year later, on June 8, 2006, Dr Cady penned a letter to Defendant stating that he finds "nothing in his [i e Plaintiff's] history or physical exam to contradict the finding of the functional capacity evaluation " (Pl Ex 6) When asked further what he believes Plaintiff's "specific capabilities and limitations" are, Dr Cady reiterated there were no clinical findings to contradict the FCE However, he also stated

> I did not repeat the Functional Capacity Evaluation as this does not fall under the realm of my area of expertise I am not certain of the restrictions placed on Mr McGowen by Dr

> Candler as you did not include these in your letter Perhaps, an additional examination by a third party physiatrist and/or physical therapist would be appropriate in this matter

(Pl Ex 8)

> Nonetheless, Dr Candler concluded that
>
> It was my judgment, based on my knowledge of Mr McGowen's history of back pain, discussions with Dr Lanzino and review of a functional capacity evaluation, that the restriction that Mr McGowen not lift, push or pull more than 25 pounds was appropriate and nothing indicated to me that my judgment was incorrect

(Candler Aff ¶ 7)

Based on Dr Candler's evaluation, then, Plaintiff was considered by Defendant to have a 25 pound weight restriction on lifting, pushing and pulling

As a result of the imposition of this weight restriction, Plaintiff was unable to secure two different positions Plaintiff states that he bid for a sheet fabricating job in Department 114 that involved the use of a "CNC laser " (McGowen Dep p 18) He states that he was the senior bidder for this job and it should have been awarded to him but for the weight restriction He also indicates that he bid on the same job in Department 106 Again, he was the senior bidder on this job but was not awarded the job because of the weight restriction (McGowen Dep pp 18-19) Attached to Plaintiff's affidavit is a document that outlines the "primary function," the "types of

machines, tools and equipment used or operated," and the "job details" of the CNC Sheet and Plate Fabricator ("CNC Job") (McGowen Aff Ex A) The document does not indicate that the job has any lifting requirements However, Andrew Enright and Richard D'Hooge, module leaders in Departments 114 and 106, respectively, indicate that the job requires employees to lift, pull, and push more than 25 pounds [1] (Richard D'Hooge Aff ¶ 3, Andrew Enright Aff ¶ 3)

During the relevant time period, Plaintiff was subject to a Collective Bargaining Agreement and was a member of the International Union United Automobile Aerospace and Agricultural Implement Workers of America [2] Despite Plaintiff's requests, the Union did not grieve Plaintiff's failure to acquire the CNC Jobs in Departments 106 and 114 However, the Union did file a grievance and requested a third medical opinion regarding Plaintiff's weight restriction This grievance currently is pending [3]

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[1] Erich Wessels, who is the Industrial Relations Administrator, indicates in his affidavit that the industrial relations board, which would have placed Plaintiff in an appropriate job position, relied on the module leader's assessment of the weight requirements in finding that Plaintiff was not qualified for the CNC jobs (Erich Wessels Aff ¶¶ 2, 3, 13) Plaintiff offers no evidence to rebut this fact

[2] Plaintiff does not specifically admit to these facts (he indicates they are immaterial) but has provided no contrary evidence in his response to the Defendant's statement of material fact 12

[3] This information is contained in Defendant s statement of material fact 22 While plaintiff disputes some of the statements made in this material fact, he does not dispute these facts

Plaintiff alleges that Dr Candler's imposition of the 25 pound weight restriction constitutes discrimination on account of his race As a result of this discrimination, Plaintiff alleges, he was denied the CNC jobs Plaintiff specifically alleges in Count I of the Amended Complaint that Defendant discriminated against him on account of his race in violation of 42 U S C § 2000e ("Title VII"), *et seq* , by failing to place him in the "machine operator" position In this respect, Plaintiff argues that he was not reassigned to the machine operator position in Department 400, first shift, which he held prior to his injury in 1999 In Count II, Plaintiff alleges that Defendant discriminated against him in violation of 42 U S C § 1981 by failing to award him the CNC jobs Finally, in Count III, Plaintiff alleges that Defendant violated the Americans with Disabilities Act (ADA), 42 U S C § 12101, et seq , by discriminating against him based on a perceived disability In his motion for summary judgment, Plaintiff also appears to contend that he was not given an "income security benefit" on account of his race

In addition to the Motion for Summary Judgment, two Motions to strike also are before the Court Plaintiff seeks to strike the affidavits of Dr Candler and D'Hooge which are attached to Defendant's reply brief [Doc 16]

DISCUSSION

Motions to Strike

Plaintiff seeks to strike Dr Candler's affidavit, or parts thereof, because, he argues, it contains inadmissible hearsay and because it contains an

opinion "raised for the first time in the reply to the summary judgment resistance" The objectionable paragraphs of Dr Candler's affidavit state

> 5 As reflected in Clinic Progress Notes, which were kept in the ordinary course of business, a copy of which is attached hereto as Exhibit B hereto, in August 2004 I discussed with Dr Lanzino, a neurosurgeon who performed Mr McGowan's back surgery on June 2, 2004, whether the restriction should remain in place Dr Lanzino agreed that the 25 pound restriction was appropriate and should remain in place
>
> 6 In November 2004, Mr McGowen presented a note that he could lift 80 pounds Upon reviewing the note, I contacted Dr Lanzino, who told me that he was unaware that it had been sent by his office Dr Lanzino retracted the note and reiterated that he did not disagree with the 25 pound restriction
>
> 7 It was my judgment, based on my knowledge of Mr McGowen's history of back pain, discussions with Dr Lanzino and review of a functional capacity evaluation, that the restriction that Mr McGowan not lift, push or pull more than 25 pounds was appropriate and nothing indicated to me that my judgment was incorrect

(Candler Aff ¶¶ 5-7)

Plaintiff certainly is correct that hearsay statements are generally not admissible as evidence either at trial or in support of a Motion for Summary Judgment *Bombard v Fort Wayne Newspapers, Inc* , 92 F 3d 560, 562 (7th Cir 1996) Federal Rule of Evidence 802 provides that hearsay, which is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," Rule 801(c), is not admissible except as provided by the Rules Thus, if Defendant seeks to offer into evidence Dr Candler's assertion as proof that Dr Lanzino said that he had no problem with the 25 pound weight restriction, it would be inadmissible hearsay

However, the statements are not hearsay they are offered as an explanation of what motivated Dr Candler to maintain the 25 pound weight restriction and not as evidence of what Dr Lanzino said or did not say As such, the statements are not hearsay

Plaintiff next argues that the statements must be stricken because they were raised for the first time in a reply brief In Plaintiff's response to the Motion for Summary Judgment, he argued that Dr Candler's insistence on the weight restriction had no basis in fact and is therefore merely a pretext for discrimination To counter this argument, Defendant provided an affidavit of Dr Candler which explained why he maintained the weight restriction The evidence goes directly to Plaintiff's contention that Defendant's proffered reason was merely a lie This evidence also bolsters Defendant's argument, in its Motion, that it had a legitimate business reason for its decisions Plaintiff can hardly be surprised by this evidence especially as Dr Candler was disclosed as a witness

with relevant information If Plaintiff wanted to discover Dr Candler's reasoning, it would have been an easy task to depose the doctor Defendant cannot be faulted for providing evidence to support its arguments made in response to Plaintiff's arguments *See Beck v University of Wisconsin Board of Regents*, 75 F 3d 1130, 1134, n * (7th Cir 1996) (quoting *Baugh v City of Milwaukee*, 823 F Supp 1452, 1457 (E D Wis 1993)) Therefore, Plaintiff's motion to strike the affidavit of Dr Candler is without merit

Plaintiff next seeks to strike the affidavit of Richard D'Hooge Plaintiff indicates that D'Hooge was not disclosed in Defendant's Federal Rule of Civil Procedure 26(a) initial disclosures, nor were such disclosures amended to identify D'Hooge Defendant does not dispute this contention, but argues that D'Hooge's testimony was necessary in light of Plaintiff's unexpected assertion, in his response brief, that another employee, whom D'Hooge supervised, is a comparable employee to Plaintiff [4] Thus, Defendant argues that it did not anticipate that it would need D'Hooge's testimony Plaintiff's motion to strike D'Hooge's affidavit is MOOT as it is unnecessary for a determination of the Motion for Summary Judgment (as shown below)

Motion for Summary Judgment

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories, and

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[4] Pursuant to the *McDonnell Douglas* test in discrimination cases, Plaintiff is required to identify a similarly situated person not in the protected class who was treated differently

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law " Fed R Civ P 56(c) The moving party has the responsibility of informing the Court as to portions of the record that demonstrate the absence of a genuine issue of material fact *Celotex Corp v Catrett*, 477 U S 317, 323 (1986) The movant may meet this burden by demonstrating "that there is an absence of evidence to support the nonmoving party's case " *Id* at 325

Once the movant has met its burden, to survive summary judgment the "nonmovant must show through specific evidence that a triable issue of fact remains on issues on which [s]he bears the burden of proof at trial " *Warsco v Preferred Tech Group*, 258 F 3d 557, 563 (7th Cir 2001), *See also Celotex Corp* , 477 U S at 322-24 "The nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits, it must go beyond the pleadings and support its contentions with proper documentary evidence " *Chemsource, Inc v Hub Group, Inc* , 106 F 3d 1358, 1361 (7th Cir 1997)

This Court must nonetheless "view the record and all inferences drawn from it in the light most favorable to the [non-moving party] " *Holland v Jefferson Nat Life Ins Co* , 883 F 2d 1307, 1312 (7th Cir 1989) In doing so, this Court is not "required to draw every conceivable inference from the record-only those inferences that are reasonable " *Bank Leumi Le-Isreal, B M v Lee*, 928 F 2d 232, 236 (7th Cir 1991) Therefore, if the record before the court "could not lead a rational trier of fact to find for the non-moving party," then no genuine issue of material fact exists,

and the moving party is entitled to judgment as a matter of law *McClendon v Indiana Sugars, Inc* , 108 F 3d 789, 796 (7th Cir 1997) (quoting *Matsushita Elec Indus Co v Zenith Radio Corp* , 475 U S 574, 587 (1986)) However, in ruling on a motion for summary judgment, the court may not weigh the evidence or resolve issues of fact, disputed facts must be left for resolution at trial *Anderson v Liberty Lobby, Inc* , 477 U S 242, 249-50 (1986)

Plaintiff does not dispute that he is incapable of presenting facts that would support his claim that he was discriminated against in violation of the ADA Plaintiff may show that he is disabled under the ADA if he can prove that his employer regarded him as having an impairment that substantially limits a major life activity 42 U S C § 12102(2), *Kampmier v Emeritus Corp* , 472 F 3d 930, 937 (7th Cir 2007) Plaintiff has presented no evidence that Defendant regarded him as having a disability that substantially limits a major life activity Therefore this claim must fail as a matter of law

Plaintiff does, however, contend that he was discriminated against on account of his race Plaintiff raises these claims pursuant to Title VII and § 1981 which are analyzed under the same standard *Fane v Lock Reynolds, LLP*, 480 F 3d 534, 538 (7th Cir 2007) As Plaintiff has presented no direct evidence of discrimination, he is proceeding under the familiar burden shifting method articulated in *McDonnell Douglas Corp v Green*, 411 U S 792 (1973) Thus, Plaintiff must show that

1 He is a member of a protected class,
2 he was qualified for the applicable position,

3 he suffered an adverse employment action, and
4 similarly situated persons not in the protected class were treated more favorably

Fane, 480 F 3d at 538, *Ptasznik v St Joseph Hospital*, 464 F 3d 691, 696 (7th Cir 2006), *Sublett v John Wiley & Sons, Inc* , 463 F 3d 731, 737 (7th Cir 2006)

Once Plaintiff has established this prima facie case of discrimination, the burden of production shifts to Defendant who must "offer a permissible, non-discriminatory reason for the adverse employment action " *Fane*, 480 F 3d at 538 The burden then shifts back to the Plaintiff who must show that the proffered reason is merely a pretext for discrimination "The focus of a pretext inquiry is whether the employer's reason is honest, not whether it is accurate or wise " *Barricks v Eli Lilly and Co* , 481 F 3d 556, 560 (7th Cir 2007) Despite these shifting burdens, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff " *Texas Dept of Community Affairs v Burdine*, 450 U S 248, 254 (1981)

There is no dispute that Plaintiff, who is African-American, is a member of a protected class There is also no dispute that Plaintiff suffered an adverse job action, the denial of the CNC jobs, and his old job, the acquisition of which would have led to higher pay and additional benefits Defendant does dispute, however, whether Plaintiff was qualified for the CNC jobs and whether Plaintiff can show that a similarly situated person was treated more favorably It is undisputed that Plaintiff was considered "unqualified" for the CNC jobs because he was subject

to the 25 pound weight restriction This requirement is closely related to the pretext argument and will be addressed below

Plaintiff points specifically to two individuals whom he contends are similarly situated Kirby McLaughlin and Gary Edwards The only evidence that Plaintiff presents that these individuals are similarly situated is his own affidavit He states with respect to Edwards

> Within my personal knowledge, there was a Caucasian employee, Gary Edwards, in the same job, shame shift and department (first shift, Department 400), who would have had the same supervisor, Bill Coward, who is also Caucasian Mr Edwards was allowed to return to work after an injury despite not being able to lift, and was further allowed or provided income security benefits

(Pl Aff ¶ 25)

> With respect to McLaughlin, Plaintiff states

> I have personal knowledge that a Caucasian employee, Kirby McLaughlin, was working in Department 106 (the department for which I was the successful bidder), who was allowed to work with a 10-pound weight restriction and perform, the job of breaking out the cut parts She is still working in Department 106 (See Exhibit B attached hereto) Within my knowledge, she would have had the same supervisor and would have been on the same shift as I was had Deere

> allowed me to go to work in Department 106 in that position

(Pl Aff ¶ 26)

Plaintiff argues in conclusory fashion that these two paragraphs of his affidavit establish that there were two similarly situated employees who were given the positions that Plaintiff sought

First, Plaintiff's assessment of the employment conditions of McLaughlin and Edwards have no support in the record "[I]t is well settled that self-serving statements contained in an affidavit will not defeat a motion for summary judgment when those statements are without factual support in the record" *Smith v Potter*, 445 F 3d 1000, 1008 (7th Cir 2006) (quotation marks and citations omitted), *See also Cichon v Exelon Generation Co , L L C* , 401 F 3d 803, 810 n 8 (7th Cir 2005), *and see Lujan v National Wildlife Federation*, 497 U S 871, 888 (1990) ("The object of this provision [Rule 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit") The only evidence Plaintiff points to in the record is a time sheet which shows that McLaughlin worked in department 106, shift two, on April 15, 2007 There is no evidence of any weight restriction or even any evidence of what job McLaughlin was performing Plaintiff also has presented no evidence with respect to Edwards (except for his own statements) Therefore, Plaintiff has presented no competent evidence of any similarly situated employee who was treated more

favorably [5] He has failed to carry his prima facie burden

Even if Plaintiff's affidavit constitutes competent evidence,[6] he still has not established that McLaughlin or Edwards are similarly situated "A similarly situated employee is one who is 'comparable to plaintiff in all material respects' "*Perez v Illinois*, 488 F 3d 773, 773 (7th Cir 2007) (quoting *Crawford v Ind Harbor Belt RR Co* , 461 F 3d 844, 846 (7th Cir 2006) (emphasis in original)) In making this determination, Courts generally "consider whether the employees 1) had the same job description, 2) were subject to the same standards, 3) were subject to the same supervisor, and 4) had comparable experience, education, and other qualifications" *Boumehdi v Plastag Holdings, LLC* , 489 F 3d 781, 2007 WL 1583980, *6 (7th Cir 2007) In this particular situation, a material issue is whether an employee who had a

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[5] Plaintiff goes on to list the names of other employees who were "allowed to return to work from injuries and were provided income security benefits" (Pl Aff ¶ 27) There is no evidence to support this contention nor is there even an argument that these employees are similarly situated in all material respects As such, Plaintiff has failed to establish a prima facie case with respect to the income security benefits claim and it must fail as a matter of law

[6] Plaintiff's affidavit itself can be considered "evidence in the record" See Buie v Quad/Graphics, Inc 366 F 3d 496, 504 (7th Cir 2004) ("The record, moreover, may include the self serving affidavit itself, provided that the affidavit meets the usual requirements for evidence on summary judgment including the requirements that it be based on personal knowledge and that it set forth specific facts showing that there was a genuine issue for trial" (citations omitted))

similar lifting restriction as Plaintiff was treated more favorably *Barricks*, 481 F 3d at 559-560 ("The 'similarly situated' test is a flexible, commonsense inquiry whose requirements vary from case to case ") With respect to Edwards, Plaintiff only indicates that he was not "able to lift " There is no evidence of what weight restriction Edwards was under, whether he also was incapable of pushing and pulling with other weight restrictions, or any other details of Edwards' job Plaintiff does not indicate that Dr Candler examined Edwards or that he agreed or disagreed with Edward's treating physician Plaintiff does not even place Edwards in any type of time context there is no suggestion that Edwards was employed by Defendant during the relevant time period The purpose of comparison "is to determine whether there are enough common factors between a plaintiff and a comparator-and few enough confounding ones-to allow for a meaningful comparison in order to divine whether discrimination was at play " *Id* at 560 Plaintiff has presented insufficient evidence to make any comparison meaningful

With respect to McLaughlin, Plaintiff states that she worked in Department 106 with a 10 pound weight restriction[7] and performed specifically the "job of breaking out the cut parts " The job description, that Plaintiff provides as Exhibit A to his affidavit, indicates that the CNC job requires more than just "breaking out the cut parts " Other duties include

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[7] Defendant disputes that McLaughin was under a 10 pound weight restriction According to a business record attached to D'Hooge's affidavit, McLaughin is under a 30 pound weight restriction

forging, cutting, setting, operating machinery, and other activities If McLaughlin is in fact limited to "breaking out the cut parts" then she would not be comparable to an employee, like Plaintiff, who would be required to perform all the CNC job functions As such, she is not similarly situated In any event, Plaintiff has offered no evidence that McLaughlin suffered the same injury as himself, that she was evaluated by Dr Candler, that her treating physician did not agree with Dr Candler's assessment, that she was under the specific weight restrictions that Plaintiff was operating under, or that she is otherwise similar in terms of qualifications There is also no evidence that she bid on the same CNC jobs as Plaintiff at the same time As Plaintiff has failed to present evidence to support his prima facie burden, his claim must fail

Even assuming that all of the foregoing problems with Plaintiff's proffer of Edwards and McLaughlin as similarly situated employees could be overcome, there still would exist a fatal hurdle impossible to overcome In light of Plaintiff's theory of discrimination that Dr Candler has racial animus, Edwards and McLaughlin are patently dissimilar because there is no showing that Dr Candler treated them in a fashion similar to Plaintiff Plaintiff has presented no evidence that Dr Candler imposed weight restrictions on Edwards or McLaughlin There is no evidence that any such weight restrictions were contrary to their treating physician's restrictions (or lack thereof) While Plaintiff focuses on the result of the weight restrictions (that Edwards and McLaughlin were allowed to work in spite of lower restrictions), he fails to focus on Dr Candler's involvement in either Edwards or McLaughlin's limitations

Moreover, even if Plaintiff did manage to meet his prima facie burden, Defendant has presented evidence that Plaintiff was not given his old position back nor was he placed in the CNC jobs because he had a 25 pound weight restriction imposed by Dr Candler [8] In order to show that this is merely pretext, Plaintiff argues that the weight restriction is unsupported by the record and therefore beyond belief Plaintiff specifically argues that neither Dr Lanzino, Dr Cady, or Monson imposed the across-the-board weight restriction of 25 pounds that was imposed by Dr Candler Plaintiff goes on to argue that as these medical professionals essentially disagreed with Dr Candler, and as Dr Candler performed no examination of his own, such a weight restriction is a deliberate falsehood and the real reason for Dr Candler's assessment is because he is biased against Plaintiff because of his race

The Court initially notes that Plaintiff does not tie up Dr Candler's assessment (and alleged discriminatory animus) with the actual person who decided that Plaintiff could not perform his old job or the CNC jobs Indeed, Plaintiff does not even identify that decision-maker nor does he indicate how Dr Candler's animus, if any, could be imputed to that decision-maker That is, Plaintiff has presented no evidence that a decision-maker was biased, nor has he presented evidence that any such decision-maker knew that Dr Candler was biased In *Alexander v*

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[8] Enright indicates that the CNC job in Department 106 required an operation to be able to lift, push, or pull more than 25 pounds It is undisputed that the CNC jobs in Department 106 and 114 are identical in requirements

Wisconsin Department of Health and Family Services, 263 F 3d 673 (7th Cir 2001), the plaintiff, Robert Alexander, was subject to a 10-day suspension imposed by Susan Moritz, his supervisor, based on a report by Donna Carlson, an intermediate supervisor, concerning Alexander's failure to "strap carts" when instructed to do so The plaintiff alleged that the suspension was the result of race discrimination by Moritz and Carlson In assessing whether Alexander would show pretext, the Seventh Circuit stated

> Moritz's reliance on Carlson's description of the cart strapping incident would not be an acceptable basis for the adverse employment action taken against Alexander if Alexander could show that Carlson harbored racial animus towards him, and that Moritz knew or should have known of Carlson's bias Likewise, Alexander could also undermine the defendants' stated reason for his suspension by showing that Moritz herself carried a bias towards Alexander Alexander has not shown, however, that Carlson's actions reflected a racial animus towards him that Moritz knew or should have known about, or that Moritz herself carried a bias that tainted her role as a decision-maker

Id at 685-686 (citations omitted)

In order to show pretext, Plaintiff must show that the decision-maker was biased or that he (or she) knew that Dr Candler was biased Even if Plaintiff could prove that Dr Candler was biased against Plaintiff on account of his race, he has failed to tie any such bias with the actual decision-maker

Nonetheless, Plaintiff presumably is arguing that Dr Candler's bias is imputed to the decision-maker because he is "an employee without formal authority to materially alter the terms and conditions of a plaintiff's employment [who] nonetheless uses [his] 'singular influence' over an employee who does have such power to harm the plaintiff for racial reasons " *Brewer v Board of Trustees of University of IL*, 479 F 3d 908, 917 (7th Cir 2007) That is, Dr Candler is the functional decision-maker because his 25 pound weight restriction alone led to the denial of the jobs at issue As such, Plaintiff must show that Dr Candler's 25 pound weight restriction is a "lie" or a reason that is dishonest or that did not genuinely motivate the relevant decision *Burks v Wisconsin Department of Transportation*, 464 F 3d 744, 754 (7th Cir 2006) At most Plaintiff has merely shown that Defendant may have been mistaken in its assessment of Plaintiff's weight restrictions Plaintiff only has shown a disagreement between medical professionals

This disagreement is highlighted by the various letters and explanations that Plaintiff himself offers as evidence The documents reveal that defendant, through Erich Wessels and Dr Candler, contacted and solicited Dr Lanzino, Dr Cady, and Monson, to specify and explain Plaintiff's weight restrictions According to Dr Candler, Dr Lanzino's response to such a request convinced him that a 25 pound weight restriction was appropriate (Candler Aff ¶ 7) Dr Cady himself indicated that he did not have expertise in an FCE and referred Defendant to Monson's FCE without giving his own opinion as to what weight restrictions Plaintiff should be working under (Pl Exs 6 and 8) Monson, whose FCE provided detailed and specific weight restrictions, indicated in summary

fashion that a "25# restriction on a frequent basis would be appropriate" (Wessels Aff, Ex 3) Based on this input and his undisputed knowledge of Plaintiff's history (a history that included a 25 pound weight restriction), Dr Candler believed that an across-the-board 25 pound weight restriction is appropriate

Plaintiff has not shown that such reasoning is beyond belief or is a lie Instead, Plaintiff would have this Court independently determine whether the decision was correct As the Seventh Circuit has noted

> It is not our role to determine the competency of or interfere in employment decisions simply where we believe an employer has made a poor choice Federal courts have authority to correct an adverse employment action only where the employer's decision is unlawful, and not merely when the adverse action is unwise or even unfair "We do not sit as a super-personnel department with authority to review an employer's business decision as to whether someone should be fired or disciplined because of a work-rule violation"

Ptasznik, 464 F 3d at 697 (quoting *Balance v City of Springfield*, 424 F 3d 614 (7th Cir 2005)) Similarly, this Court cannot be tasked with determining the correctness of a medical decision based on the record before the Court While Dr Candler's decision may not be the wisest or most accurate assessment of Plaintiff's weight restriction, Plaintiff has not established that it is implausible or baseless *Fane*, 480 F 3d at 541 No reasonable jury, based on the evidence before the Court, would conclude that Defendant intentionally

discriminated against Plaintiff, in any respect, on account of his race

CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment filed by Defendant on May 1, 2007 [Doc 13] is GRANTED, the Motion to Strike Affidavit of William Candler filed by Plaintiff, William McGowan, on June 19, 2007 [Doc 17] is DENIED, and the Motion to Strike Affidavit of Richard D'Hooge filed by Plaintiff on June 19, 2007 [Doc 19] is MOOT The Clerk is directed to enter Judgment in favor of Defendant, Deere & Company, and against Plaintiff, William McGowan CASE TERMINATED

Entered this 20th day of July, 2007

/s/ Joe B McDade
JOE BILLY McDADE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 15, 2009

Before

JOEL M FLAUM, *Circuit Judge*

ANNE CLAIRE WILLIAMS, *Circuit Judge*

WILLIAM T LAWRENCE, District Judge*

No 07-2967

WILLIAM A MC GOWAN, *Plaintiff – Appellant,*	Appeal from the United States District Court for the Central District of Illinois
v	No 06 C 4003
DEERE & CO , INC *Defendant – Appellee*	Joe Billy McDade Judge

ORDER

Upon consideration of the petition for rehearing and the petition for rehearing en banc, filed on September

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The Honorable William T Lawrence, United States District Judge for the Southern District of Indiana, sitting by designation

25, 2009, no judge on active service has requested a vote, and all of the judges on the original panel have voted to **DENY** the petition for rehearing

Accordingly, the petition for rehearing is **DENIED**

Supreme Court, U.S.
FILED
MAR 19 2010
OFFICE OF THE CLERK

No. 09-964

In The
Supreme Court of the United States

WILLIAM A. McGOWAN,

Petitioner,

v.

DEERE & CO., INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition where the Seventh Circuit's Opinion affirming the District Court's application of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1983) does not conflict with any decision of this Court or of any Court of Appeals, nor implicate an important federal question that has not been settled by this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition by presenting a question – whether the second prong of the *McDonnell-Douglas* test merges with the issue of pretext – which will not affect the outcome of his race discrimination case.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Deere & Company has no parent corporation and no publicly held company owns ten percent (10%) or more of Deere & Company stock.

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STATEMENT OF CASE

McGowan's race discrimination case is based solely on a dispute over his lifting restriction. In the courts below, McGowan framed the issue as one of a discrepancy between medical professionals as to the appropriate weight restriction and conceded that "Deere and its consulting physician, Dr. Candler, believed that such a [twenty-five (25) pound] restriction was appropriate." (McGowan's Appellate Brief at page 8). He presented no evidence that Deere's reason for its decision not to place McGowan on the jobs he desired -- McGowan's weight restriction – was suspect and that its real motivation was discriminatory. McGowan acknowledged the weight restriction was the reason he did not get those jobs. (R.133, 134, 192).[1]

McGowan was employed by Deere at its facility in East Moline, IL, John Deere Harvester Works, during the litigation and his employment did not end in 2004 as he claims in the Petition at p. 3. (R.108). He was a member of a union, the United Auto Workers, and understood that his employment with Deere was governed by a Collective Bargaining Agreement ("CBA"). (R.109). The Industrial Relations Department at John Deere Harvester Works, which is responsible for employment issues relating to the wage work force at the facility, applied the CBA and consulted with module leaders (supervisors) to make decisions regarding McGowan's job placement. (R. 118-20).

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[1] Citation to materials contained in the record before the Court of Appeals is set forth as (R. _____).

McGowan had a history of problems with his back, injuring it in 1999. He was determined to be incapacitated for work on July 3, 2001 in his then current C-6, CNC Sheet Plate Fabricator classification. (R.119). McGowan was reassigned to the position of Material Storage Retrieval in 2001, in accordance with the CBA. (R.119). After his injury in 1999, he had a twenty five (25) pound weight restriction. (R. 119).

McGowan's assertion that Dr. Candler would not allow him to return to his job as a machine operator is false. (Petition, p. 4). McGowan had no contractual right to return to the position of machine operator and did not request to return to that position. (R. 54). This was undisputed before the District Court. (R. 92, 149).

McGowan had surgery on his back in 2004 (Petition, p. 3). On August 5, 2004, Deere's physician, Dr. Candler, and McGowan's back surgeon, Dr. Lanzino, agreed that a permanent restriction of no lifting, bending, reaching, twisting, or pulling of greater than twenty-five (25) pounds was appropriate. (R.119, 123). McGowan presented no evidence to the courts below that Dr. Lanzino believed a permanent twenty-five (25) pound lifting restriction was inappropriate. The July 31, 2004 and October 20, 2004 notes from Dr. Lanzino's nurse practitioner, which indicate McGowan could lift more than twenty-five (25) pounds, were considered by Deere's physician, Dr. Candler, and discussed with Dr. Lanzino, who reiterated he did not disagree with a twenty-five (25) pound restriction. (R.287-288).

Nothing in the record supports McGowan's assertion at page 4 of the Petition that Dr. Candler

ordered a Functional Capacity Examination in 2006 from a physical therapist. However, an FCE was performed by an independent physical therapist and the FCE results were consistent with Dr. Candler's judgment that a twenty-five (25) pound lifting restriction was appropriate for McGowan. (R. 119, 124). Significantly, McGowan's own treating physician, Dr. Cady, found nothing in McGowan's history or physical examination to contradict the findings of the FCE. (R.273, 74).

In making decisions regarding job placement for McGowan, the Industrial Relations Department consulted with module leaders responsible for supervising the production positions at issue, which is a well-established custom and practice under the CBA to determine whether an employee would be able to perform the position at issue, given the employee's capabilities. McGowan's lifting restriction could not be accommodated in the jobs in Departments 106 and 114 for which he was the senior bidder. Accordingly, he was not the "senior qualified applicant" under the CBA. (R.118-20).

When Plaintiff filed suit, he did not just sue for race discrimination. He also claimed he was discriminated against in violation of the ADA. However, he did not dispute that he was incapable of presenting any facts which would support his ADA claim when faced with Deere's Motion for Summary Judgment. (District Court Opinion, Petitioner's Appendix pg. 24).

Contrary to McGowan's assertion at page 4 of the Petition, Deere did not admit he was injured at its plant. (R.29, 53). Also, contrary to McGowan's

assertion at page 4 of the Petition, Deere did not admit McGowan was cleared by his doctor to return to work with only temporary weight lifting restrictions. (R.29, 53). It was undisputed that McGowan had no contractual entitlement to return to the position of Machine Operator under the CBA and did not request to return to that position. (R. 54, 192, 149).

McGowan does not fairly characterize Deere's Motion for Summary Judgment. It was not based merely on his inability to prove pretext. Rather, McGowan presented no admissible evidence that he was qualified for the positions that he sought and presented no evidence of a similarly situated person not in the protected class who was treated more favorably, two of the four elements of his *prima facie* case under the *McDonnell- Douglas* analytical framework. (R. 89-90).

McGowan's assertion at page 5 of the Petition that he provided proof from his own doctor he was qualified for the jobs (he did not have a twenty-five (25) pound lifting restriction) is incorrect. McGowan provided no testimony from his own doctor. Deere's Clinic Progress Notes indicated Deere's doctor spoke with McGowan's doctor and they agreed on the twenty-five (25) pound permanent lifting restriction. (R. 119, 123). The subsequent notes from a nurse practitioner are not "proof from his own doctor" and were considered by Deere's doctor. (R. 287-88).

McGowan's assertion at page 5 of the Petition that he identified other similarly situated employee's of Deere, not of African/American descent, who were allowed to return to the same or similar jobs even though they had more stringent weight restrictions is

false. McGowan submitted his own affidavit which, even if accepted for summary judgment purposes, was insufficient. (Court of Appeals Decision, Petitioner's Appendix at pg. 9-10). McGowan failed to articulate the critical areas of focus between McGowan and his comparators which were the work restrictions each individual had and the duties each individual was required to perform. (Lower Court Decisions, Petitioner's Appendix pg. 7-10, 26-30).

As McGowan notes in his Statement of the Case at page 6, the Court of Appeals held he failed to adequately prove intentional discrimination. (See Court of Appeals Opinion, Petitioner's Appendix, p. 34). Indeed, McGowan failed to set forth any evidence of intentional discrimination or that Deere's stated reasons for not giving McGowan the jobs he wanted were pretextual. Not only did he fail to set forth any such evidence, he conceded Deere had a basis for the lifting restriction and did not dispute the job expectations were such that one with a twenty-five (25) pound lifting restriction could not do the job. (McGowan's Appellate Brief, p. 8).

Moreover, he failed to identify any racial animus on the part of any decision maker or Dr. Candler, the company physician. He testified Dr. Candler was merely mistaken about the lifting restriction (R. 109). He failed to address the fact an independent FCE and an opinion from McGowan's treating physician were consistent with Dr. Candler's judgment. (R. 118-20, 123,124).

McGowan argued that the Court of Appeals decision conflicted with its prior decision in *Peirick v. Indiana University-Purdue University Indianapolis*

Athletics Department, 510 F.3d 681 (7th Cir. 2007) and the opinion of this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). His petition for rehearing *en banc* was denied. (Petition Appendix, p. 36-39). McGowan's reading of these cases is that he need not provide evidence of pretext if he has established a *prima facie* case (which McGowan failed to do) under the *McDonnell Douglas* analytical framework. McGowan wants this Court to hear whether he may maintain a race discrimination case based on a discrepancy as to his appropriate lifting restriction and nothing else.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with any decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. They are consistent with the *McDonnell-Douglas* analytical framework articulated by this Court. The reasons set forth by McGowan are wholly insufficient to sustain his burden of setting forth "compelling reasons" for granting his Petition under Sup. Ct. R. 10 (c).

Contrary to his argument, the Seventh Circuit Court of Appeals has not articulated a "merger doctrine" which relieves an employee from proving the employer's stated reason for the employment decision was pretextual under the *McDonnell- Douglas* analytical framework. In addition, the decisions below are entirely consistent with this Court's precedent in *St. Mary's Honor Center v. Hicks*, 509 U.S 502 (1992) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

Finally, the lower courts properly decided that McGowan failed to present enough evidence to sustain a *prima facie* case under *McDonnell-Douglas* because he failed to present sufficient evidence Deere treated comparable employees less favorably, the fourth prong of the *prima facie* case. Accordingly, merging the second prong of *McDonnell-Douglas* (that he was qualified) with an employee's burden of proving the employer's reason for its employment decision would not change the outcome of this case in any event.

I. "Compelling Reasons" to Revisit the *McDonnell-Douglas* Analytical Framework Do Not Exist Where No Rational Fact Finder Could Find Deere Discriminated Against McGowan Because of His Race.

McGowan argues that this Court should review this case to settle whether "the Seventh Circuit's merger doctrine" first announced in *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1179 (7th Cir. 1997) should be the law of the land as a further elaboration of the *McDonnell-Douglas* analytical framework. He argues that this would be a logical extension of this Court's holdings in *St. Mary's* and *Reeves*. He contends that under Sup. Ct. R. 10(c) this is an important issue of federal law for the Court to consider.

There is no "merger doctrine". McGowan's characterization of Seventh Circuit law and contention that the Court should hear this case to decide whether the doctrine is a logical extension of its holdings is not a "compelling reason" for granting the petition under Sup. Ct. R. 10 (c). In arguing the Court should hear this case because of the so called "merger doctrine," McGowan does not contend that courts have decided

an important question of federal law that has not been, but should be, settled by this Court. He does not argue that the lower courts in this case decided an important federal question in a way that conflicts with relevant decisions of this Court.

McGowan's characterization of Seventh Circuit case authority applying the *McDonnell-Douglas* analytical framework is misguided. He argues that a "merger doctrine" was first announced in *Coco,* 128 F.3d at 1179. However, in *Coco,* the Seventh Circuit rejected the same argument made by McGowan here – that an employee should be relieved of proving pretext if he provides proof he met the employer's expectations.

In *Coco,* the Seventh Circuit explained as follows:

> "The Defendant's expectations are not legitimate if they are phony; so if they are argued to be phony, the issue of legitimate expectations and the issue of pretext seem to merge. *Coco* wants us to merge them – wants us, since he was fired and replaced by a much younger person, to proceed directly to the pretext stage.
>
> To do so would be contrary to the thinking behind the formula. The formula is best understood as derived from a judgment about what evidence would be sufficient to persuade a rational fact finder that the defendant had discriminated against the plaintiff. The judgment is that if the non invidious reason offered by the defendant is not credible, the fact finder can reasonably, though he need not, infer that the real reason was a discriminatory one.

See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)." *Coco*, 128 F.3d at 1179.

Applying this Court's decision in *Burdine*, 450 U.S. at 255, n. 10, the Seventh Circuit explained in *Coco* that "this judgment would not make sense without imposing certain preconditions, the most obvious of which is that the employee be a member of a group protected by the anti-discrimination law in question. Less obvious, but still important, is that the employee meet the employer's legitimate expectations. Once the employee is over the hurdle of legitimate expectations (meaning simply bonafide expectations) the issue may indeed merge with the issue of pretext. That is, if the employee presents enough evidence that the expectations were not bonafide, that evidence may also show that the reasons that the employer has given for the employment decision are phony." *Coco*, 128 F.3d at 1180.

The Seventh Circuit's comments in *Coco*, and subsequently in *Hague v. Thompson Distribution Co.*, 436 F.3d 816, 823 (7th Cir. 2006) and *Peirick v. Indiana University-Purdue University Indianapolis Athletics Department*, 510 F.3d 681, 687 (7th Cir. 2007), do not relieve McGowan of his obligation to provide proof from which a rational fact finder could find that Deere discriminated against him based on his race. Ultimately, the "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983), citing *Burdine*, at 253. McGowan is asking this Court to hear a case where no evidence was presented from

which a rationale fact finder could infer unlawful discrimination.

As this Court explained in *Aikens*, the "*prima facie* case method established in *McDonnell Douglas* was never intended to be rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination (citation omitted). Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence to decide whether the defendant intentionally discriminated against the plaintiff." (emphasis supplied). *Aikens*, 460 U.S. at 715, citing *Burdine*, 450 U.S. at 253.

McGowan implies that a "merger doctrine" is unique to the Seventh Circuit when he states he found no authority from other circuits addressing the issue. (Petition, at p. 9). However, courts in circuits other than the Seventh Circuit have also had no problem dispatching an employee's argument that he should be relieved of the burden of providing evidence of pretext. In *Lilla v. Comao Pico, Inc.*, No. 05-72518, 2007 WL 2050828 (W.D. Mich. July 18, 2007), an employee argued that under *St. Mary's* and *Reeves* he could rely solely upon his *prima facie* proofs to establish pretext. The court rejected this argument, noting it was based upon selective passages from each case cited out of context.

McGowan argues that relieving him of the burden of proving pretext would be a logical extension of *St. Mary's* and *Reeves*. However, nothing in this Court's

decisions in *St. Mary's* or *Reeves* provides a "compelling reason" for this Court to hear this case to determine whether McGowan should be relieved of providing proof that Deere's reasons were pretextual. Indeed, both decisions clearly require an employee to persuade the fact finder that intentional discrimination took place in order to prevail in a Title VII case.

In *Reeves*, this Court explained that the petitioner had "made a substantial showing that the Respondent's explanation for its employment decision was false." 530 U.S. at 144. However, this Court held that the fact finder's rejection of the employer's legitimate non discriminatory reason for its action "does not compel judgment for the plaintiff, the ultimate question being whether the employer intentionally discriminated." In other words, in *Reeves,* the Court reiterated "that it is not enough to disbelieve the employer, the fact finder must believe plaintiff's explanation of intentional discrimination." 530 U.S. at 146-147.

In *St. Mary's,* this Court explained that it had "no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate fact finder determines, according to proper procedures, the employer has unlawfully discriminated." It explained that while "it may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttal of presumption . . . nothing in law would permit [the Court] to substitute for the required finding that an employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that an employer's explanation of its action

was not believable." 509 U.S. at 514. Accordingly, an "extension" of *St. Mary's* or *Reeves* would not involve relieving McGowan of providing proof that Deere's explanation for its employment decision was untrue.

McGowan asserts that the Seventh Circuit's decision in *Hague* is similar to the facts in this case. (Petition at pg. 10-11). In *Hague,* employees alleging race discrimination asserted that under *Coco* if they asserted the employer is lying about the business expectations required for the position, the second prong and the pretext questions "merge." The Seventh Circuit explained that plaintiffs must still meet their burden of showing pretext and that while it focused on the question of pretext, plaintiffs also did not show they met the employer's legitimate expectations. The Seventh Circuit merely noted that "it is simpler to run through the analysis only once". 436 F.3d at 823.

In this case, McGowan never contended Deere's business expectations for the job were phony and he never set forth any evidence Deere was lying about whether the jobs he wanted could be performed with a twenty-five (25) pound lifting restriction. Indeed, he conceded that the restriction was the reason he did not obtain the jobs. (R.133, 134, 192). McGowan even admits that "Deere and its consulting physician, Dr. Candler, believed that such a [twenty-five (25) pound] restriction was appropriate." (McGowan's Appellant Brief at pg. 8). Accordingly, McGowan was not contesting the legitimacy of Deere's reasons. Instead, he was asking the lower courts to resolve a dispute regarding his lifting restriction as a race discrimination case.

As the Court of Appeals explained, it went to great lengths in *Peirick* to note the circumstances in that case demonstrated the employer's stated reason was suspect. (See Court of Appeals Opinion at Petitioner's Appendix at pgs. 11-12, citing *Peirick,* 510 F.3d at 691-94.) Distinguishing this case from *Peirick,* the Court of Appeals correctly noted that McGowan was mistaken if he believed that he need do no more than demonstrate that a twenty-five (25) pound restriction is inaccurate. The Court of Appeals explained that nothing in *Peirick* indicated an employee is relieved of the obligation of coming forward with evidence of pretext.

The Court of Appeals recognized this Court's cautionary language in *Reeves* that circumstantial evidence probative of intentional discrimination can include proof an employer's explanation for its action is unworthy of belief. However, the Court of Appeals also noted that *Reeves* did not eviscerate the requirement that there still must be circumstances demonstrating the presence of intentional discrimination, the harm Title VII was meant to redress. Here, far from providing circumstantial evidence of pretext, McGowan conceded Deere's reasons were legitimate.

McGowan sums up his argument on the so called "merger doctrine" by making the assertion that "evidence he could lift more than twenty-five (25) pounds is evidence of his qualification for his job and is also evidence that Deere's explanation for its action was just a pretext or a lie." (Petition at pg. 12). But as the Court of Appeals correctly notes, unlike the circumstances of *Reeves* and *Peirick,* there is no evidence suggesting Deere's stated reason for its

decision is suspect. (Court of Appeals Opinion, Petitioners Appendix, p. 9). Indeed, as noted by the Court of Appeals, the medical evidence supports a twenty-five (25) pound restriction. Dr. Candler, Deere's physician, was well acquainted with the fact that McGowan had been under a twenty-five (25) pound restriction following his initial injury in 1999. Deere had an opinion from a physical therapist who completed an FCE that concluded that an across the board restriction of twenty-five (25) pounds on a regular basis was appropriate. McGowan's treating physician, Dr. Cady, did not find any basis to dispute that FCE. McGowan correctly conceded Deere believed its doctor and its doctor believed a twenty-five (25) pound restriction was appropriate. (Appellate Brief at pg. 8).

There is no circumstantial evidence in the record that the lifting restriction or job expectations were a cover for race discrimination. Relieving McGowan of the burden of presenting such evidence would ultimately relieve him of proving Deere's employment decisions were motivated by race. No rational fact finder could have found Deere discriminated against McGowan based on his race and McGowan's mischaracterization of Seventh Circuit case authority is not a "compelling reason" to grant his Petition.

II. The Decisions Below are Wholly Consistent with This Court's Decisions in *St. Mary's* and *Reeves*.

McGowan asserts that the decisions below conflict with *St. Mary's* and *Reeves*, warranting this Court's review under Rule 10(c). Again, McGowan is asking this Court to hear a case based on a discrepancy as to

the appropriate lifting restriction and nothing else. He argues that the lower courts considered Deere's credibility and that conflicting evidence as to whether he could lift twenty-five (25) pounds should have been resolved by the trier of fact. (Petition, p. 13).

Whether McGowan's weight restriction was appropriate was not an issue that was decided by the lower courts. The Court of Appeals correctly declined McGowan's invitation to lead it "down a path of reconciling conflicting medical evidence." (Court of Appeals Opinion, Petitioner Appendix. p. 11). The Court of Appeals' refusal to decide McGowan's weight restriction is not an important federal question decided in a way that conflicts with relevant decisions of this Court which would warrant review under Sup. Ct. R. 10(c).

McGowan selects a quotation from the Court of Appeals and argues its focus was not "whether the restriction was accurate, but the honesty" of Deere's belief. (Petition, p. 13). However, this does not indicate an assessment of Deere's credibility that was properly one for the trier of fact. This comment was about McGowan's failure to present any evidence relating to the issue of whether Deere's stated reason for its employment decision was a pretext.

III. Application of a "Merger Doctrine" Relieving McGowan of Providing Proof of Pretext Would Not Change the Outcome of the Case.

McGowan did not establish a *prima facie* case under the *McDonnell Douglas* framework because he did not present evidence that a similarly situated

person not in the protected class was treated more favorably. (Court of Appeals Opinion, Petitioner's Appendix, pg. 7-10). However, McGowan contends there is a "compelling reason" for this Court to grant review under Sup. Ct. R. 10(c). McGowan contends the finding of the courts below that he failed to sustain his burden of showing evidence of comparables under the *McDonnell-Douglas* framework conflicts with this Court's decision in *Lujan v. National Wildlife Federation,* 497 U.S. at 888-89 (1990), that "one sworn averment" of each disputed fact is sufficient to avoid summary judgment. He also argues that materials must be viewed in the light most favorable to the party opposing the motion under this Court's decision in *Adickes v. S. H. Kress & Co.*, 390 U.S. 144, 158-59 (1970).

McGowan's argument rests on a mischaracterization of the record presented to the courts below. His assertion at page 16 of the Petition that he "identified two (2) [comparable] employees, specifying their weight lifting limitations" is false. McGowan's affidavit was considered by the lower courts and was found to be insufficiently detailed as to his proffered comparators' weight restrictions and the duties each was required to perform. (Court of Appeals Opinion, Petitioner's Appendix pg. 7-10, District Court Opinion, Petitioner's Appendix p. 26-30). The affidavit was procedurally and evidentially deficient as well.

McGowan was asked about the comparators he proffered in Rule 26 Disclosures in written interrogatories and at his deposition during discovery. He <u>never</u> testified about employees not of African/American descent being able to perform the jobs he sought, given the same weight restrictions.

Subsequently, in response to Deere's Motion for Summary Judgment, he filed an Affidavit in which, he testified generally about two (2) employees, Edwards and McLaughlin. (R. 116, 133, 144).

Although he had identified these employees in his interrogatory answers and during his deposition, he only testified that they were treated more favorably than him because they were allowed benefits and placed in temporary positions while recovering from injuries or illness. He did not testify they were allowed to perform the jobs he wanted with similar weight lifting restrictions. (R. 116, 133, 144).

McGowan's affidavit in response to Deere's Motion for Summary Judgment contradicted the disclosures and testimony he provided during discovery. In his Affidavit, McGowan testified that Edwards was allowed to return to work after an injury despite not being able to lift, specifying no specific restrictions or job to which Edwards returned. He testified that McLaughlin, at some unspecified time, was allowed to work in a department in which McGowan sought a job, with a ten (10) pound weight restriction, without identifying the basis for his personal knowledge of McLaughlin's restriction. (R. 209).

While the District Court noted this Court's statement in *Lujan* that the object of Fed. R. Civ. P. 56 (e) "is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit" (District Court Opinion, Petitioner's Appendix, pg. 27), the Court of Appeals held that it need not decide if the affidavit meets appropriate evidentiary criteria, because even accepting it for summary judgment purposes, it is insufficient. (Court

of Appeals Opinion, Petitioner's Appendix pg 8). The Court of Appeals correctly noted that the affidavit provided no evidence to shed light on the specifics of Edward's restrictions. The Court of Appeals further noted that the affidavit provided no information on how the alleged comparables were assessed by Dr. Candler, or even if they were assessed by him, and how the assessment might relate to or possibly conflict with medical records from other medical providers. The Court of Appeals correctly held that McGowan provided insufficient details about his proffered comparators to allow a meaningful comparison and therefore could not make out a *prima facie* case of race discrimination. (Court of Appeals Opinion, Petitioner's Appendix At 9-10).

McGowan has only mischaracterized the record he presented to the courts below on the issue of the comparators he proffered. He has not carried his burden of demonstrating that the decisions below conflict with the decisions of this Court or a Court of Appeals. McGowan has not raised an important question of federal law that has not been settled. He has not carried his burden of setting forth a "compelling reason" as to why this Court should grant his Petition under Sup. Ct. R. 10(c) and this Court should not grant the Petition to address the so-called "merger doctrine" because McGowan cannot establish a *prima facie* case under the *McDonnell-Douglas* analytical framework in any event.

CONCLUSION

McGowan has not established any compelling reasons for this Court to grant the Petition. Therefore, Deere respectfully requests the Petition be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

WILLIAM A. McGOWAN,

Petitioner,

v.

DEERE & CO., INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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I. MC GOWAN DID NOT MATERIALLY MISSTATE THE RECORD.

Deere opens its opposition by quoting McGowan's brief in the Court of Appeals selectively and out of context. Deere takes less than one sentence from that brief out of context and repeats it on pages 1, 12, 14, and 18 of its brief in opposition. Deere's misquotation is no reason to deny certiorari.

Deere quotes from McGowan's statement of facts in his opening brief in the Court of Appeals as follows:

> Deere and its consulting physician, Dr. Candler, believed that such a [twenty-five (25) pound] restriction was appropriate.

(Brief in Opposition at 1, 12 (bracketed material exactly as in the brief in opposition).)

The full paragraph that McGowan actually wrote reads:

> In August of 2004, however, Deere's doctor, William O. Candler, D.O., insisted that McGowan was permanently restricted from lifting more than 25 pounds. (C.110, 123.) Apparently to resolve the discrepancy, Deere ordered a functional capacity evaluation of Mr. McGowan. (C.124.) The discrepancy was that McGowan and his treating physician, Dr. Lanzino, did not believe that McGowan was restricted from lifting more than 25 pounds and Deere and its

> consulting physician, Dr. Candler, believed that such a restriction was appropriate.

In writing this paragraph, McGowan did not concede the honesty of Candler's belief. Rather, McGowan was simply presenting the evidence below without argument, as required. Notably the Court of Appeals did not use that language to affirm. Thus, the statement is no reason to deny certiorari.

Deere's correctly observes on pages 2 and 3 of its brief that the record does not reveal that Dr. Candler ordered the functional capacity examination warrant denying certiorari. Deere's observation does not affect the merits of this case.

Deere correctly points out on page 3 of its brief that Deere did not admit in its answer that McGowan was injured in Deere's plant. But McGowan was in fact injured on at Deere's plant. Deere did not deny that allegation in the summary judgment proceedings, satisfied to object to it then as "[i]mmaterial." (C.307.) McGowan testified in his deposition that he injured his back while at work:

> I was running parts, and it was very heavy parts, and we were sort of behind, and I was being pushed, and those parts at that time come from outside, and I think there was rain on them, and they was oily, and when I went to pull apart, I pulled two of them.

(C.109.)

The absence of an admission in Deere's answer is no reason to deny certiorari.

Similarly, the fact that Deere did not admit in its answer that Dr. Lanzino cleared McGowan for work with only temporary lifting restrictions does not affect the merits of this case. Dr. Lanzino and his nurse wrote:

> We feel that he would be able to go back to work on Monday and we would like him not to lift over 50 pounds for one month and then he should be able to go up to full duty at that time.

(C.187.)

Nor did McGowan unfairly characterize the motion for summary judgment as Deere alleges on page 4 of its brief. McGowan never suggested that the sole basis for the motion was an inability to prove pretext.

Deere errs when it argues on page 4 of its brief that McGowan presented no proof from his own doctor that he did not have a 25-pound lifting restriction. Indeed, the letter from Dr. Lanzino and his nurse, and a subsequent note from the nurse, are in fact such proof. (C.186-87.)

II. THERE IS A MERGER DOCTRINE IN THE SEVENTH CIRCUIT THAT WARRANTS REVIEW.

Deere argues on page 7 of its brief that there is no merger doctrine in the Seventh Circuit. Yet the Seventh Circuit holds:

> Where, as here, an employee claims that she 'performed satisfactorily and the employer is lying about the business expectations required for the position, the second prong and the pretext question seemingly merge because the issue is the same – whether the employer is lying.'"

(*Peirick v. Indiana University-Purdue University Indianapolis*, 510 F.3d 681, 687 (2007).)

As established by Deere's inability to find any commentary from any other Court of Appeals on this unique, thirteen-year-old doctrine, this Court should it.

For the foregoing reasons, McGowan respectfully requests a writ of certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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